

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42060 (Sub-No. 1)

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: January 6, 2005

In a decision served on August 13, 2004, the Board ordered the parties to propose a joint procedural schedule. On September 30, 2004, North America Freight Car Association (NAFCA), joined by intervenors National Industrial Transportation League and American Chemistry Counsel, and The Burlington Northern and Santa Fe Railway Company (BNSF) filed separate motions for adoption of a procedural schedule. Although the parties state that they conferred as directed, they were unable to agree on the length of time allocated for various discovery phases within a procedural schedule. NAFCA seeks a 330-day procedural schedule, while BNSF seeks a 240-day schedule.

NAFCA claims that it needs nearly a year to complete its case because it has multiple complainants, making it more time consuming to prepare discovery and substantive pleadings. NAFCA appears to calculate the time it will need for each complainant to respond sequentially, suggesting that the time period proposed by BNSF for response to discovery requests amounts to an average of only 8 days per complainant. This argument is unpersuasive, as it is reasonable to assume that complainants will work simultaneously to respond to discovery and prepare substantive filings.

While multiple complainants face some difficulties in gathering, combining and reviewing work product, in comparison to other types of cases, including complex cases, the procedural schedules proposed by both complainants and defendant are unnecessarily long. Under 49 CFR §1111.8(a), the Board provides a total of 210 days for all discovery and pleadings in stand-alone cost rate reasonableness cases. Under 49 CFR §1180.4(e)(2), the Board provides 180 days for completion of the evidentiary record in a significant merger and one year in a major merger. Stand-alone cost rate cases and merger cases are the most complex cases that come before the Board. In fact, the scope of this case is more limited than stand-alone cost rate cases and should require no more time than the regulations provide in those cases. Therefore, a procedural schedule will be adopted premised on the stand-alone rate case regulatory schedule, providing 75 days for discovery and limited time for depositions.

While both parties request that the discovery disputes at issue be referred to an Administrative Law Judge (ALJ) for resolution, it does not appear at this time that an ALJ will be needed to resolve discovery disputes between the parties. Accordingly, the parties' request for the appointment of an ALJ to handle discovery matters will be denied.

The parties should discuss and attempt to resolve any disputed discovery requests. As a general rule, the Board expects parties to try to resolve their differences on their own before involving the Board. If, after making a good faith attempt to resolve any disputes over the particulars of discovery requests, the parties are at an impasse with respect to any discovery disputes, they should notify the Board in writing by February 25, 2005. At that point, if necessary, the Board will intervene and decide whether a discovery conference will be conducted to try to resolve those disputes.

It is ordered:

1. The requests for appointment of an ALJ to handle discovery matters are denied.
2. The procedural schedule in this proceeding is as follows:

<u>Day</u>	<u>Event</u>
January 6, 2005	Date of service and effectiveness of Board Procedural Schedule Order
January 11, 2005	Petitions for Protective Orders Due
February 7, 2005	Written Interrogatories and Document Requests Due
February 15, 2005	Objections to Discovery Due
March 22, 2005	Responses to Discovery Due
March 28, 2005	Notices of Depositions Due
April 26, 2005	Depositions Completed
June 6, 2005	Opening Statements of NAFCA and Intervenors Due

July 6, 2005 Reply of Defendant Due

August 5, 2005 Rebuttal of NAFCA Due

3. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary